No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF ON THE MERITS BY RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES CITED:

STATEMENT OF THE CASE

This limited Statement of the Case is submitted to correct what Respondent perceives to be certain inaccuracies or omissions in the Statement of the Case provided by Petitioner. The Sac and Fox Nation is a federally recognized Indian Tribe organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. §501, *et seq.*, and has been vested with all the governmental rights of a Tribe organized pursuant to the Indian Reorganization Act by the federal Charter issued to the Sac and Fox Nation by the Secretary of the Interior. C.A. App. Exh. 4, Art. VII. The "Indian Reorganization Act Provisions" of the Charter extended Sections 2, 4, 7, 16, and 17 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, and all other rights or privileges secured to a Tribe organized pursuant to the Indian Reorganization Act, to the Sac and Fox Nation. The Sac and Fox Nation, then, is also organized pursuant to the Indian Reorganization Act, and vested with all of the rights, powers, and privileges of such Tribes, having followed the Congressional prescription, 25 U.S.C. §503, to regain any rights or powers which it arguably may have failed to retain or receive by virtue of its initial exclusion from the Indian Reorganization Act, or through earlier legislation.

Respondent also takes exception to Petitioner's continued use of the term "former Sac and Fox Reservation." While both parties to this action have vigorously argued the point, no Court has ruled that Respondent's Reservation created by the Treaty of 1867, 15 Stat. 495, has been abolished. Further, the record shows that the original allotments pursuant to the Sac and Fox Allotment Agreement, 26 Stat. 750 (hereinafter "Allotment Agreement"),

were, with limited exceptions, taken in two compact contiguous areas, C.A. App. Exh. 15, in the northeast and southwest corners of the 1867 Reservation, and not, in general, "randomly scattered throughout the area" as stated in Petitioner's brief.

The existing records revealed by research with respect to the negotiation and transmittal to Congress of the Sac and Fox Allotment Agreement are included in the record. C.A. App. Exh. 12. There is no statement therein that the Sac and Fox Reservation will no longer be a reservation. The offer of a fixed value for the surplus land – as opposed to the Tribe selling the land to settlers itself for as much as it could obtain with the proceeds being paid into the Treasury – was not presented as a result of any stated desire to extinguish the reservation. Instead, the Commissioners indicated that it would be a mistake for the Tribe to sell the land to white people themselves because they would not be able to obtain at private sale the price the government was offering. C.A. App. Exh. 15.

The presumption in the Allotment Agreement of continuing Sac and Fox authority over the reservation after the 1891 allotment is further supported by the Record. C.A. App. Exh. 35 (National Council Records Of 1893, p. 2-5 [establishing Tribal offices and pay scale, appropriating funds for support of the government]; p. 7 [Probating estate of Eva Wah-kol-li]; p. 11 [Protest of federal plans to allow licensed trader's to locate on Agency lands as "contrary to the terms of our late treaty with the United States"]; p. 13 [*"Permission granted Lee Patrick to build and maintain a barn on land leased him by Mary A. Means and permission to remain on reservation."*]); C.A. App. Exhs. 37,

38, and 39 (Reservation Trader's Licenses issued by Commissioner of Indian Affairs for Traders on the Sac and Fox Reservation in 1897, 1895, and 1894, *see* 25 U.S.C. §262); C.A. App. Exhs. 40, 41, 42, and 43 (Interior Department Letters in 1904, 1908, 1909, and 1915 requiring Indian Trader's licenses on the *Sac and Fox Reservation*); C.A. App. Exhs. 49 and 50 (1893 Letter from the Secretary of the Interior and Commissioner of Indian Affairs stating that Oklahoma has no "right to enter upon the reservation for the purpose of taxing employees of the government and licensed Indian traders."). Simply stated, all of the facts in the record show that the Sac and Fox and the Interior Department both believed that the Sac and Fox Reservation remained intact after the allotment, and both treated the area as a continuing Indian Reservation through at least 1915, long after Oklahoma statehood.

Even if the Court were to conclude that the original boundaries of the 1867 Reservation were extinguished, it is clear that the retained Tribal lands and all of the original allotments together constituted a diminished Reservation. Both Petitioner and the Solicitor General have failed to mention that it was only the "residue" of the lands remaining after the trust patents for the allotments were issued – the lands which were neither allotted nor retained by the Sac and Fox Nation – which became public lands of the United States for the limited purpose of being opened for white settlement. Article V, Sac and Fox Allotment Agreement of February 13, 1891, 26 Stat. 749. As to the Allotments, the Sac and Fox Nation was never compensated for these properties, and they were never declared to be public lands of the United States.

Finally, there is no support in the Record for the statements of Petitioner that "no one resides at the tribal headquarters" and "all roads in Oklahoma are constructed and maintained by the state and the Tribe provides none of these services." Both of these statements are untrue. The Sac and Fox Principal Chief resides in a Tribal building at the headquarters. On the same tract of land which contains the tribal headquarters buildings, the Tribe has a mobile home park in which a number of people reside, both Indian and non-Indian. Many persons, Indian and non-Indian, live on Sac and Fox Indian allotments and in several hunderd units of the Sac and Fox Housing Authority. Further, the Tribe, with the assistance of the federal government, has constructed or provided assistance in maintaining or repairing a number of streets, roads, and bridges within the Reservation, and is currently scheduling more such work.

SUMMARY OF THE ARGUMENT

Consistent with its position in the Courts below, Respondent believes that the taxing authority of the State of Oklahoma at issue herein can be resolved in the Nation's favor simply by reference to the Indian Country status of the Tribal lands, housing units, and retained Indian allotments and straightforward application of *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980) to this action. Respondent, however, has analyzed the historical and conceptual development both of the

term "Indian Country," and the precise status of the Sac and Fox Nation's territorial domain within the meaning of the term "Indian Country" due to the unusual and unique positions taken with respect thereto by the Petitioner and the United States as *Amicus Curiae*.

Research reveals that the true term of art descriptive of the area for the exercise of tribal self-government is "Indian Country" which includes within the tripartite statutory definition of that term (a) Indian Reservations; (b) Dependent Indian Communities; and (c) Indian trust or restricted allotments. When a tract of land satisfies the test of any one of these classifications, it is Indian Country for jurisdictional purposes. When considered in light of the statutory definition, 18 U.S.C. §1151, and the resulting rule regarding the level of proof needed to find an extinguishment of reservation boundaries, it is clear that there is nothing in the record of this case which would support a decision extinguishing the 1867 reservation boundaries. However, even if the original boundaries were found to be extinguished, it appears that a diminished reservation consisting of retained tribal and allotted lands resulted from the allotment process. Finally, even if the allotted lands were held to not constitute a part of the diminished reservation, their inclusion in the statutory term "Indian Country" means that they are still within the jurisdiction of the Nation and outside of the authority of the State.

The essence of federal Indian law, as expressed in the Constitution, Treaties, Statutes, and Court decisions, is the allocation of governmental authority concerning persons, places, and subject matter between the Federal, Tribal, and State governments. Depending upon one's philosophy this allocation could be made in the first instance either by Congress or by the Courts. Respondent

submits that it is Congress, through exercise of its powers pursuant to the Commerce Clause and Treaty Clause, as effectuated by the Supremacy Clause, which should be the final arbiter of policy in this regard. Traditional notions concerning the allocation of jurisdiction between the Federal, Tribal, and State governments within the Indian Country as expressed in *Worcester v. Georgia*, 6 Pet. 515 (1832) and recent Congressional legislation, *see* H.R. CONF. REP. No. 102-261, on P.L. 102-137, 1991 U.S.C.C.A.N. Leg. Hist. 379, should prevail in the absence of a clear Congressional determination to the contrary.

In analyzing this attempt by the State to intrude its laws into the Indian Country of the Sac and Fox Nation, then, it is important to begin the analysis with the relevant Constitutional provisions, treaties, and statutes. When these materials are viewed in light of the traditional rules of interpretation applied by this Court, it is clear that at the time of its creation the State of Oklahoma received no authority to levy or collect the taxes at issue here, and has never been granted specific authority from Congress to tax income or personal property within the Indian Country of the Sac and Fox Nation.[1] Further, the State has not complied with the procedure set out by statute to acquire general civil or criminal jurisdiction over the lands of the Nation. Given the complete absence of State civil or criminal jurisdiction concerning Indians within the Indian Country of the Sac and Fox Nation, and

[1] Congress clearly knows how to authorize State taxation of Indian Tribes within Oklahoma: Act of March 3, 1921, §5, 41 Stat. 1249 (Osage Oil and Gas); Act of March 3, 1921, §26, 41 Stat. 1225 (Quapaw Minerals).

the Sac and Fox Treaties which go so far as to expressly authorize Tribal punishment of non-Indians within the Nation's territory, it is clear that the State cannot tax the income or personal property at issue herein when the income is earned, and the property bought and held within the Indian Country. The Court should decline the Petitioner's invitation to redraw the allocation of authority within the Sac and Fox Indian Country absent clear and explicit Congressional directives to do so, and remit Petitioner to the Congress for special legislation or its own legislature for compliance with 25 U.S.C. §§1322-1326.

ARGUMENT

I. THE PROPER QUERY HERE IS WHETHER THE SAC AND FOX NATION HAS RETAINED INDIAN COUNTRY SUBJECT TO ITS GOVERNMENTAL JURISDICTION.

Both Petitioner and the United States, as *Amicus Curiae*, appear to place some magical connotation upon the term "reservation," under the apparent theory that a "reservation" is somehow imbued with more status than other types of Indian Country. However, a review of the usages of Congress and this Court shows that all Indian Country, including Indian Reservations, Dependent Indian Communities, and Indian Allotments, is jurisdictionally indistinguishable.

The term "Indian Country" is perhaps first generally defined by statute in the Act of June 30, 1834, 4 Stat. 729 (1834) as "all that part of the United States . . . to which

Indian title has not been extinguished," and at that time included within its terms the area which now comprises the State of Oklahoma. The jurisdictional effect of the early statutes defining certain lands as Indian Country on the allocation of authority within the Indian Country, was summarized by the noted Indian law scholar and Associate Solicitor for the Department of the Interior, Felix Cohen, in his HANDBOOK OF FEDERAL INDIAN LAW 6 (1942 Ed.), the official governmental treatise on the subject,[2] as follows:

> Indian Country in all these statutes is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by statute, and state law is not applicable at all.[3]

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[2] FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW vii-ix, (1982 Ed.), Michie Bobbs-Merrill, Pub. (Hereinafter referred to as "COHEN").

[3] The complete prohibition as to the application of state law in the Indian Country has been modified to the extent Congress has deemed proper. 18 U.S.C. §1161 (liquor laws); Act of February 15, 1929, Ch. 216, 45 Stat. 1185 (health and education)(25 U.S.C. §231); 25 U.S.C. §§232, 233 (New York); 18 U.S.C. §1162 (criminal jurisdiction in Public Law 83-280 states); 28 U.S.C. §1360 (civil jurisdiction in Public Law 83-280 states); 25 U.S.C. §§1321 *et seq.* (assumption and retrocession of civil or criminal jurisdiction by states which are not mandatory Public Law 83-280 states). Oklahoma was not granted, and has never assumed, jurisdiction over Indian country within its borders pursuant to Public Law 83-2380. Although this Court has recently allowed some State laws to apply to some persons within the Indian Country absent specific Congressional authorization, *Oklahoma Tax Commission v. Citizen Band Potowatomi Tribe*, 111 S.Ct. 905 (1991), Respondent respectfully suggests that policy matters concerning the further allocation of authority to the States concerning the Indian Country should be resolved by Congress, and not by the courts.

Although the 1834 definition of Indian Country was not included in the Revised Statutes of the United States, and therefore repealed, it provided a useful mechanism for the Court to apply statutory laws relating to "Indian Country" and "Indian Reservations." *Donnelly v. United States*, 228 U.S. 243, 269 (1913). In *Bates v. Clark*, 95 U.S. 204, 209 (1887) the Court had stated:

> It follows from this that all the country described by the act of 1834 as Indian Country remains Indian Country so long as the Indians retain their original title to the soil, and ceases to be Indian Country whenever they lose that title, in the absence of any different provisions by treaty or by act of Congress.

In a series of now famous cases, the Court developed a definition of "Indian Country" at common law in order to give effect to the several different Congressionally authorized types of Indian land tenure which included Indian reservations both within a Tribe's aboriginal area, and on lands previously held by the United States but set aside for the use of the Tribe by various mechanisms, *Bates v. Clark*, 95 U.S. 204 (1887); *Donnelly v. United States*, 228 U.S. 243 (1913), trust and restricted Indian allotments whether within or without continuing Indian Reservations, *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 271 U.S. 467 (1926), and areas set aside for the use and occupancy of Indians (dependent Indian communities) although not called a "reservation". *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. McGowan*, 302 U.S. 535 (1938).

Although Indian Country status had originally been tied to aboriginal ownership of the soil, the Court in *Donnelly v. United States*, supra, extended the application of the term to lands reserved for tribes carved from the public domain. Prior to 1948, however, Tribal ownership remained the benchmark indicia of Indian Country status for Indian reservations as a historical consequence of the 1834 act. In pre-1948 decisions, as well as those later cases which rely without critical analysis upon such decisions while ignoring the plain import of this statute,[4] the ownership of title to the soil was often critical to the status of land as Indian Country or "reservation" land.

These pre-1948 decisions left open the question of whether land within the exterior boundaries of an Indian reservation which was held in fee (in other words an "open" reservation) was Indian Country. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 8 (1942 Ed.). The practical issue of this "open reservation" question was whether federal and tribal jurisdiction remained viable in reservation areas where allotments had been taken and the surplus sold, or where trust periods had expired, or where restrictions against alienation had been removed. In some cases, the courts simply noted that the lands had been allotted or sold to non-Indians, and declared that the area was no longer a reservation for some jurisdictional purposes, *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943). In others, it appeared that the issuance of patents within a reservation made no jurisdictional difference. *United States v. Thomas*, 151 U.S. 577 (1894); *United States v. Celestine*, 215 U.S. 278 (1909).

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[4] *Seymour v. Superintendent*, 368 U.S. 351 (1962).

In 1948, Congress in the exercise of its Constitutional authority over Indian affairs, U.S. CONST., ART. 1, SEC. 8, CL. 3, resolved this issue in favor of exclusive federal and tribal jurisdiction over trust and fee patented lands within reservations, and codified the Supreme Court's other existing common law classifications of Indian Country in the Act of June 25, 1948, 62 Stat. 757, codified in its present form at 18 U.S.C. §1151, which states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

United States v. Mazurie, 419 U.S. 544, 547 (1975). Oklahoma was not excepted from the terms of this Act. The impact of this Congressional action was to render obsolete Court decisions which tied the Indian Country jurisdictional status of Indian reservations to issues of land title, and to define by statute the territorial area for the operation of tribal government.[5] The question of continuing land ownership remains statutorily relevant only in the context of Indian allotments outside Indian reservations. The Court, while often speaking in terms of "reservation" or "allotment" or "dependant Indian community"

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[5] *See*, generally, COHEN, supra note 2, at pp. 27-46.

as relevant in a particular circumstance has, since 1948, clearly held that "Indian Country" is the recognized term of art defining the territorial area for the exercise of tribal self-government. *United States v. Mazurie*, 419 U.S. 544 (1975);[6] *Decoteau v. District Court*, 420 U.S. 425 (1975);[7] *United States v. John*, 437 U.S. 634 (1978);[8] *Solem v. Bartlett*, 465 U.S. 463 (1984),[9] and the Congress has consistently

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[6] "Cases such as *Worcester*, supra, and *Kagama*, supra, surely establish the proposition that Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.' " *Mazurie* at U.S. 557.

[7] In footnote 2 of the opinion, the Court stated: "If the lands in question are within a continuing 'reservation,' jurisdiction is in the tribe and the Federal Government 'notwithstanding the issuance of any patent' . . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are 'Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.' While §1151 is concerned on its face, only with criminal jurisdiction the Court has recognized that it generally applies as well to questions of civil jurisdiction." (citations omitted). After concluding that the Sisseton-Wahpeton reservation had been disestablished, the Court concluded: "In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. §1151(c)." *Id.* at U.S. 446.

[8] At page 649 of the opinion, the court stated: "With certain exceptions not pertinent here, §1151 includes within the term 'Indian country' three categories of land. The first, with which we are here concerned, is [Indian reservations]." In the accompanying footnote 17, the Court stated in part: "Inasmuch as we find in the first category a sufficient basis for the exercise of federal jurisdiction in the case, we need not consider the second and third categories [of Indian country]."

[9] In footnote 8 at page 467 of the opinion the Court stated: "Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. In addition, opened lands that have been restored to reservation status by subsequent Acts of Congress fail within the exclusive criminal jurisdiction of federal and tribal courts." (citations omitted).

referred to this Indian Country definition in civil legislation regarding Indians.[10]

II. THE SAC AND FOX INDIAN COUNTRY CONSISTS OF ITS RESERVATION, THE ALLOTMENTS, AND ANY DEPENDENT INDIAN COMMUNITIES WITHIN THE 1867 RESERVATION BOUNDARIES

A. THE 1867 SAC AND FOX RESERVATION REMAINS UNDIMINISHED AND CONSTITUTES INDIAN COUNTRY.

In response to this newly codified statutory definition, this Court adopted a new rule to determine the subsequent Indian Country status of reservation areas in *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District Court*, 420 U.S. 425 (1975), and *Solem v. Bartlett*, 465 U.S. 463 (1984). These cases teach that once an area of land has been set apart as an Indian reservation, all tracts within that area remain Indian Country until the reservation is extinguished by Congress. The corollary to this rule is that the statute or treaty extinguishing the reservation must be

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[10] *See*, for example, 28 U.S.C. §1360; 25 U.S.C. §§1322-1326 (Acquisition by the States of Civil Jurisdiction in the Indian Country); 25 U.S.C. §1903(10) Indian Child Welfare Act; 25 U.S.C. §3202(8) Indian Child Protection and Family Violence Prevention. This list is by no means exhaustive.

clear on its face,[11] or, if the statutory language could be interpreted to extinguish the reservation but is ambiguous, the legislative history and tribal understanding must clearly indicate an intent to terminate reservation status. *DeCoteau v. District Court,* supra. Anything less than this clear language or showing of intent and understanding will result in a finding that the reservation continues as Indian Country due to the traditional rules that ambiguities are to be resolved to the benefit of the Indians, and that Indian treaties and agreements must be interpreted as the Indians would have understood them. *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1976); *DeCoteau v. District Court,* supra; *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1916); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).

The Petitioner argues that "cede" and "convey" type language in the Sac and Fox Allotment Agreement is all that is necessary to extinguish the 1867 Reservation.

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[11] In *Mattz v. Arnett,* 412 U.S. 481 (1973), the Court gave examples of language it considered clear expressions of the intent to extinguish reservation boundaries at footnote 22, page 504: "The Smith River reservation is hereby discontinued" from 15 Stat. 221 (1868); the North Half of the Colville Indian Reservation "be, and is hereby, vacated and restored to the public domain" from 27 Stat. 63 (1892); "the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished" from 33 Stat. 218 (1904). The Ponca, Otoe, and Missouria reservations referenced were in Oklahoma, and the lack of such clear language with respect to the Sac and Fox Nation's Reservation indicates that Congress only intended to extinguish these three particular reservations in Oklahoma.

However, it should be noted that the language of the Sac and Fox Allotment Agreement, 26 Stat. 749 (1891), is similar to language which was determined to be suited to disestablishment but ambiguous in *DeCoteau v. District Court,* supra. While in *DeCoteau* the resulting resort to the surrounding circumstances and legislative history showed that the Congressional action in question was clearly intended and understood to terminate the Reservation and such evidence weighed against the finding of continued reservation status for the land in question, in this case the facts presented to the lower court show a complete lack of support for such a finding. The language of the Sac and Fox Allotment Agreement is substantially similar to earlier Sac and Fox treaties in which they ceded land to the United States, yet retained governmental rights and authority, and the right to live and hunt within, and otherwise control, the "ceded" area.

Words such as "cede" and "relinquish" were used in many of the Sac and Fox treaties. However these words provided little indication to unlettered tribal leaders[12] as to whether or not a Sac and Fox Reservation was to be disestablished, created, or moved to another location. The Sac and Fox Treaty of November 3, 1804, 7 Stat. 84, provided that the Sac and Fox "do hereby cede and relinquish forever to the United States, all the lands

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[12] Note that most of the National Council of the Sac and Fox Nation at the adoption of the 1885 constitution did not even have English names, and, apparently, could not read and write the English language. C.A. App. Exh. 1, p. 8. Further, Mah-Ko-Sah-Toe and Moses Keokuk, the Principal Chief and First Assistant Principal Chief, executed the Allotment Agreement by their mark, being apparently unable to read or write English.

included within the above-described boundary." *Id.* at Article 2. Although the land was ceded and relinquished forever, the same treaty provided in part:

> ART. 7. As long as the lands *which are now ceded* to the United States remain their property, the Indians belonging to the said tribes, shall enjoy the privilege of living and hunting upon them. (Emphasis added).

The Sac and Fox were allowed to live upon the land they ceded and use it as they saw fit.

Other treaties likewise make it clear that the "cede" and "relinquish" language was not determinative. In the Treaty of July 15, 1830, 7 Stat. 328, the land was ceded, but Article 1 of the Treaty provided:

> But it is understood that the lands ceded and relinquished by this Treaty, are to be assigned and allotted under the direction of the President . . . to the Tribes now living thereon, or to such other Tribes as the President may locate thereon for hunting, and other purposes.

In the Treaty of Sept. 21, 1832, 7 Stat. 374, the Sac and Fox once again ceded land to the United States. However the Treaty provided at Article 2:

> ARTICLE II. Out of the cession made in the preceding article, the United States Agree to a reservation for the use of . . . tribes . . .

The Treaty of May 6, 1861, 12 Stat. 1171, also contained "cede, relinquish, and convey" language. But Article 3 of that Treaty further provided:

> The reservation herein described shall be surveyed and set apart for the exclusive use and benefit of the Sacs and Foxes of Missouri, and the remainder of the Iowa lands shall be the tribal reserve of said Iowa Indians for their exclusive use and benefit.

Thus many Sac and Fox treaties would have the tribe cede land to the United States, and the United States would then set aside all, or a portion of, the land which was ceded for the use of the Sac and Fox.

Other treaties make it clear that the Sac and Fox retained rights and privileges in land which was ceded to the United States. The Treaty of October 21, 1837, 7 Stat. 543, states in part:

> ARTICLE 1st. The Missouri Sac and Fox Indians make the following cessions to the United States: . . .
>
> Second. Of all the right *to locate, for hunting or other purposes, on the land ceded* in the first article of the treaty of July 15 1830, which, by the authority therein conferred on the President of the United States they may be permitted by him to enjoy. (Emphasis added).

This indicates that the Sac and Fox gave up rights to land ceded in 1830 by this treaty which was made in 1837. It is clear that the Sac and Fox could cede lands and retain a reservation in the same land. The "cede" and "relinquish" language in the 1891 Allotment Agreement must be considered in light of these previous Sac and Fox treaties.

Given the long history of the United States using cession language in Sac and Fox Treaties without always extinguishing the tribal reservation or rights in the land ceded, the cession language, standing alone, is ambiguous at best. Since the Sac and Fox were not to be moved

by the 1891 Allotment Agreement and there was nothing in the negotiations which specifically stated that the reservation would cease to be a reservation, there was no reason for the Sac and Fox to believe the reservation was destroyed. Further, as noted in the introduction to this Brief, the record reflects that the Interior Department and the Sac and Fox National Council, from the time of the Allotment Agreement through at least 1915, acted consistently with the notion that the 1867 Reservation boundaries had not been extinguished.

Treaties or agreements said to affect reservation boundaries must be construed liberally in favor of the Tribe, *Choctaw Nation v. United States*, 318 U.S. 423 (1943); *Choate v. Trapp*, 224 U.S. 665 (1912); *Creek Nation v. Hodel*, 851 F.2d 1439 (D.C. 1988), and interpreted as the tribe would have understood them – a land transaction not a disestablishment of the reservation. *Choctaw Nation v. United States*, supra. Ambiguity must be decided in favor of the tribes.

The ambiguity in this Agreement must also be interpreted in favor of the Sac and Fox because of the one-sided nature of the Agreement. In *Sac and Fox Tribe v. United States*, 340 F.2d 368 (Ct.Cl. 1964), the Court found that:

> In 1889 and 1890 there was great political pressure on the Government to provide more land for white settlers. The result of this political pressure became apparent in the negotiations between the Jerome Commission and the Sac and Fox Tribes. Not only were the tribes told by the land commissioners that they must sell; they were admonished that they could sell only to

> the United States, and only when the United States was ready to buy; that they could not even lease or mortgage the lands. Finally, they were told by the Commission in language of unmistakable import that $1.25 per acre was all they could get because that was all the Commission and the Congress would approve. They were even advised by one of the Commissioners that 'we have offered you more lands and made a better offer than the law provides for.' (Proceedings of the Jerome Commission, National Archives, Record Group 75, letters received 4738/1894, encl. 2.) The combined effect of all of these admonitions could only be interpreted as a flat ultimatum to the illiterate and unsophisticated representatives of the Sac and Fox that they had better take $1.25, 'or else,' in common parlance. . . .
>
> Even if we assume that the negative characterization of the conduct of the Government by the Indian Claims Commission, as above quoted, is correct, the fact remains that this sale was negotiated by Government coercion and compulsion exerted upon appellants to such a degree as to constitute duress.

Id. at 374. *See, The Cherokee Nation v. United States*, 9 Ind.Cl.Comm. 162, 234-35 (1961). This case then, is no *DeCoteau v. District Court*, in which the tribal representative voluntarily agreed that the reservation should be terminated, and Congress clearly intended to do so. Instead, it was a contract of adhesion which should be interpreted strictly against the government and in favor of the Sac and Fox. There is no doubt that Congress knew exactly how to abolish Indian reservation boundaries in

Oklahoma when it chose to do so.[13] The reservation of the Sac and Fox has not been disestablished, and the exclusive power of the Sac and Fox Nation to tax within its reservation is without question.

B. IF THE 1867 RESERVATIONS BOUNDARY WAS EXTINGUISHED, THE RESERVATION WAS DIMINISHED BUT NOT ABOLISHED.

If the Court should determine, in the face of the uncontroverted facts in the record showing that the tribal leadership and the Interior Department both believed that the 1867 Reservation continued during the two decades immediately following the Allotment, that the Allotment Agreement extinguished the original 1867 Reservation boundaries, it is clear that the Allotment Agreement simply diminished the land area of the Reservation to the retained tribal land and the parcels allotted to individual Indians.

As noted by the Solicitor General, Article II of the Allotment Agreement expressly excepted 800 acres from the operation of the Allotment Agreement and was to remain "the property of said Sac and Fox Nation, to the full extent that it is now the property of said Nation" – in other words, part of the Sac and Fox Reservation. Further, it is difficult to square the notion of the Solicitor General that the Allotments to individual Indians was somehow

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[13] See, Act of April 21, 1904, Ch. 1402, Sec. 8, 33 Stat. 189: " . . . That the reservation lines of the said Ponca and Otoe and Missouria Indian reservation be, and the same are hereby abolished. . . . "

compensation to the Nation for the loss of the lands allotted to individual Indians. The Agreement clearly pays for only the "surplus" land remaining after the Tribal lands and allotted lands are subtracted from the area of the Reservation, for if additional allotments were necessary, the amount of compensation was reduced. Allotment Agreement, Article 4. If the individuals are viewed as legally distinct from the Nation, then the Nation, having not been paid for the Allotments, received no compensation for that land. If such is the case, then the United States still owes the Nation for the Allotted property as it was taken without just compensation in violation of the Fifth Amendment to the Constitution. *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935); *Menominee Tribe v. United States*, 391 U.S. 404 (1968). On the other hand, if the allottees and the Nation are viewed as the same legal entity, then the Nation simply received that which it already admittedly owned – certainly not "consideration" in classical contract law analysis, and not "compensation" pursuant to the Fifth Amendment.

Further, and in addition to the facts in the Record showing that the Interior Department consistently treated the allotted lands as Reservation lands for over twenty years after Allotment, the Allotment Agreement itself expressly states that "It is further agreed that as soon as such allotments are so made, and approved by the Department of the Interior, then *the residue* of said tract of country, shall, as far as said Sac and Fox Nation is concerned, become public lands of the United States, and under such restrictions as may be imposed by law, be subject to white settlement." Allotment Agreement at Article V. Given the prior history of "cession" treaties, the

failure to pay the Nation for the Allotments, the provisions of the Agreement which presume continuing control over the affairs of the allottees, Allotment Agreement, Article IV, Para. 5, and the taking of the allotments in what is essentially two contiguous but separated tracts, C.A. App. Exh. 15, it is clear that if the original boundaries were extinguished, a diminished Reservation consisting of the retained tribal land and the allotments remained set apart for the use of the Sac and Fox Nation, and that Congress anticipated and intended that result. 26 The Chronicles of Oklahoma 457.

The Acting Commissioner of the Department of Interior, in a letter dated December 11, 1908, explained the status of business leases upon the reservation to the Superintendent of the Indian School at the Sac and Fox Agency in Oklahoma. This 1908 letter stated in part:

> The question of the individual allottee leasing land for business purposes has been gone into very thoroughly, and the Office is of opinion that while the law authorizes the leasing of Indian allotments for business purposes, it does not contemplate that the leasing of an allotment relieves the lessor from compliance with the law which requires the taking out of a license, furnishing statements of character, and the filing of a $10,000 bond.
>
> In issuing a lease, the Office prescribes no regulations as to the trade to be conducted, and there does not seem to be any valid reason why persons holding business leases on your **reservation,** should not comply with section 519, Regulations of the Indian Office, 1904 . . .

> Under the circumstances, the Office can see no reason for the lessor of Indian allotments holding business leases on your **reservation,** declining to take out a license and give bond . . . If, it should be shown that the lessors on your **reservation,** holding business leases decline to do this, you are instructed to make a full report . . .
>
> The records of the Office show that the following named persons hold business leases on your **reservation** . . . (emphasis added)

See C.A. Add. Exh. 41. There is little doubt that the Department of Interior would not have referred to the Sac and Fox reservation as a reservation unless they thought the reservation still existed. The above letter was written approximately seventeen years after the Allotment Agreement. It should also be noted that the letter was written after Oklahoma statehood.

C. EVEN IF THE SAC AND FOX RESERVATION WAS ABOLISHED, THE NATION RETAINS INDIAN COUNTRY CONSISTING OF TRIBAL TRUST LANDS, DEPENDENT INDIAN COMMUNITIES, AND INDIAN ALLOTMENTS.

The Court, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe,* 111 S.Ct. 905 (1991), determined that Tribal trust lands were the equivalent of a reservation for purposes of the allocation of jurisdiction between the Federal, Tribal, and State governments. Several areas exist within the original 1867 Reservation boundary, consisting mainly of Tribal Housing Authority cluster units, which are set apart to provide homes for Indians because

of their status as Indians and would constitute a classical Dependent Indian Community. 18 U.S.C. §1151(b). Further, there is no doubt that the allotments which are still in trust constitute Indian Country pursuant to 18 U.S.C. §1151(c). *DeCoteau v. District Court*, supra.

The Oklahoma Tax Commission would have the Court determine that none of the cases dealing with the "reservation" aspect of Indian Country should apply here, and the United States, as *Amicus Curiae*, proposes a unique new test to determine whether a "reservation community" exists. Neither position is supported by law or logic. As noted in Proposition I, above, this Court has repeatedly indicated that if a particular tract of land satisfies any portion of the tripartite definition of Indian Country, the tract is to be treated jurisdictionally as any other tract of Indian Country. In order to reach the result proposed, the Court would have to ignore two hundred years of jurisprudence in this Court, as well as the Congressional determination that all three types of land equally constitute Indian Country. Simply stated, no good reason exists to ignore the original meaning of the term Indian Country as set out by Cohen's 1942 Handbook shortly prior to the enactment of 18 U.S.C. §1151, let alone to ignore the Congressional enactment of the Indian Country statute.

Therefore, even taking the view most adverse to the Sac and Fox Nation, its Indian Country must consist of Tribal lands, the individual trust allotments, the dependent Indian communities within the 1867 boundaries, and lands afterward acquired by the United States in trust for the Tribe or individual Indians within the 1867 boundaries.

III. THE STATE OF OKLAHOMA HAS, AB INITIO, BEEN PRE-EMPTED FROM TAXING INDIAN COUNTRY INCOME AND PERSONAL PROPERTY WITHIN THE SAC AND FOX NATION.

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 178-179 (1973) the Court stated:

> . . . a startling aspect of this case is that appellee apparently conceded that, in the absence of compliance with 25 U.S.C. 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians. But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected . . . Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention, the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case.

Indeed, conferring civil and criminal jurisdiction upon a state may still leave the state without taxing authority over Indians in Indian Country. *Bryan v. Itasca County*, 426 U.S. 373 (1976). Research does not reveal any case except *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*, 111 S.Ct. 905 (1991), which has held that a state may tax Indians within any part of Indian Country where that state has no general civil or criminal jurisdiction unless Congress has specifically legislated to grant the states taxing power. In light of the recent Congressional determination that an Indian is an Indian, the Court should overrule that part of *Potawatomi* which allowed state taxation of non-member Indians absent compliance with 25 U.S.C. §§1321-1326. *See* Act of October 28, 1991, P.L. 102-137, 105 Stat. 646, amending Section 8077 of P.L. 101-511, 104 Stat. 1892; H.R. Conf. Rep. No. 102-261, 1991 U.S.C.C.A.N. Leg. Hist. 379.

A. CONGRESS PRECLUDED STATE AUTHORITY IN THE INDIAN COUNTRY FROM THE BEGINNING.

It rests with Congress to determine when the guardianship relation shall cease. Thus far Congress has not terminated that relation with respect to the Creek Nation and its members. That Nation still exists, and has recently been authorized to resume some of its former powers. *Board of County Comm'rs. of Creek County v. Seber*, 318 U.S. 705, 718 (1943). (citations omitted).

In our opinion, the purpose expressed in [Section 1 of the Oklahoma Enabling Act, 34 Stat. 167] to reserve to the government of the United States the authority to make laws and regulations in the future respecting the Indians is, under the circumstances, evidence tending to negative a purpose to repeal by implication the existing laws and regulations on the subject.

. . . .

> The reservation of the authority of Congress to legislate in the future respecting the Indians residing within the new state is clearly supportable under the Federal Constitution, art. 1, §8, which confers upon Congress the power "to regulate commerce . . . with the Indian tribes." It has been repeatedly held by this court that under this clause traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress, although it be within the limits of a state. *Ex Parte Webb*, 225 U.S. 663, 683 (1912).

Prior to 1890, all government in Oklahoma was tribal government, and the tribes residing in Oklahoma enjoyed

the full cornucopia of powers possessed by Indian tribes generally. The beginning of non-tribal government in Oklahoma came in 1890 with the advent of the Territory of Oklahoma. The Oklahoma Organic Act of May 2, 1890, ch. 182, 26 Stat. 81 (1890), contained a proviso of significance to the present case. Section 1, in pertinent part, states:

> Provided, that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which it would have been competent to make or enact if this Act had not been passed.

It is clear that the tribal governments that predated and preceded the creation of the Territory of Oklahoma were vested with exclusive civil jurisdiction over their territory including exclusive authority to levy and collect taxes. By enacting this proviso, the quoted section 1 of the Organic Act, Congress clearly intended to preserve exclusive federal and tribal jurisdiction undiminished by the creation of the new Territory, and later the new State.

The Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267, in Section 1 continued these federal and tribal protections through the creation of the State. Section 1 provides:

> That the inhabitants of all that part of the area of the United States now constituting the Territory

> of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.

Congress expressly reserved, in Section 1 of the Oklahoma Organic Act of May 2, 1890, 26 Stat. 81, and again in Section 1 of the Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, its complete and exclusive authority over the persons, property and other rights of Indians "by treaties, agreement, law or otherwise." Pursuant to these acts, Article 10, §6 of the Oklahoma Constitution exempts from state taxation:

> such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws

and Article 1, §3 thereof states in pertinent part:

> The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

The intent of the Oklahoma Organic Act with respect to the Indian tribes, and therefore that of the Oklahoma Enabling Act which contains substantially the same language, is illustrated by an exchange between Congressmen Mansur and Turner during the floor debates. The purpose of the Oklahoma government vis-a-vis the Indian tribes and their territory was explained as follows:

> MR. MANSUR: Is the gentleman aware that the laws of the United States in full force today make it a criminal offense to take intoxicating liquor into the reservation of any Indians?
>
> MR. TURNER: But I suggest to the gentleman that this is no longer a reservation, but a Territory.
>
> MR. MANSUR: But I desire to remind the gentleman that, as this bill expressly declares, *this Territorial government or organization is not for any Indian reservation whatever; it does not apply to Indian reservations.*

51 Cong. Rec. 2104 (1890) (remarks of Mssrs. Mansur and Turner) (emphasis added). Perhaps in part because the allotment agreements were then being negotiated, Congressman Mansur emphasized that the Indian tribes and their reservations were to be unaffected by the creation of Oklahoma:

> I challenge any gentleman on this floor – I care not who he is – to take any one of the first twenty-four sections of this bill [the Sections relating to Oklahoma Territory] and show where

it touches a red man at all. I repeat, for I would like to have it understood, that the first twenty-four sections of this bill do not relate to a red man or to a tribe, do not relate to the Indians in any manner whatever. The first twenty-four sections relate to white men only, of whom there are 200,000 in that Territory now asking for law and order and legislation . . . .

Now, as to every Indian reservation within the whole limits of the Indian territory as now organized, we say expressly that those first twenty-four sections of the act thus organizing this Territorial government shall not apply. Remember, gentlemen, we say in plain, clear language that as to every Indian tribe and as to the land of every Indian tribe, none of these twenty-four sections which apply to the white people shall operate.

Id. at 2176. Notwithstanding the claims of the Oklahoma Tax Commission to the contrary, it appears that the proponents of the bill to create Oklahoma did not think they had to destroy tribal government or Indian reservations in order to accomplish their purpose.

These provisions constitute specific federal statutes speaking directly to limitations on the jurisdiction of the State of Oklahoma in Indian matters. Moreover, this bar to state authority coincides with the creation of the jurisdictional competitor. From a reading of this statute, it can be said that the Territory and State have *ab initio* been preempted in this area.

In 1953, Congress enacted a special jurisdictional statute popularly known as Public Law 83-280. Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified

as amended at 18 U.S.C. §1162, 25 U.S.C. §1321, 28 U.S.C. §1360). Public Law 83-280 authorizes States to assume civil and criminal jurisdiction over Indian Country within their boundaries. Essentially, P.L.-280 is a congressional prescription for the assumption of jurisdiction by the States over matters arising in Indian Country. The significance of P.L.-280 to our present case is that the Court in *Kennerly v. District Court,* 400 U.S. 423 (1971) found that this statute is a "governing Act of Congress" preempting State action in the absence of compliance with its provisions by the State. This ruling was followed in *McClanahan v. Arizona Tax Commission,* 411 U.S. 164, where the court noted that States must follow the congressional prescription and failure to do so results in an absence of State subject matter jurisdiction concerning matters affecting Indians which arise in the Indian Country. The court in both *Kennerly* and *McClanahan* found that neither Montana nor Arizona had taken the required affirmative action to assume the claimed jurisdiction. Likewise, Oklahoma has not acted pursuant to P.L.-280 to assume civil or criminal jurisdiction within Indian Country. Finding that under the Federal Law, Oklahoma had not acted to assume jurisdiction over the Indian Country within its borders, the court, in *United States v. Littlechief,* No. 76-207-D (W.D. Okla., Nov. 7, 1977) followed and reprinted in *State v. Littlechief,* 573 P.2d 263 (Okla. Crim. 1978), commented on the impact of P.L.-280 in Oklahoma in the following fashion:

> Under the Act of August 15, 1953, Public Law No. 83-280, 67 Stat. 588 (1953) (hereinafter Public Law 83-280), the Congress gave the States permission to assume criminal and civil jurisdiction over any "Indian Country" within their

borders without the consent of the tribe affected. Title IV of the Civil Rights Act of 1968, 25 U.S.C. §§1321-1326 (hereinafter Title IV), changed the procedure set out in Public Law 83-280 and required the consent of the Indians involved before a State was permitted to assume criminal and civil jurisdiction over "Indian country." See 25 U.S.C. §§1321(a) and 1322(a). Like Section 6, Public Law 83-280, 25 U.S.C. §1324 gave States with legal impediments to the assumption of jurisdiction under Title IV permission to amend their constitutions and statutes to remove any such impediments and provided that the assumption of jurisdiction by such a State should not be effective until the required amendments had been made. Article 1, Section 3 of the Oklahoma Constitution constitutes a legal impediment. See H.R.Rep. No. 848, 83d Cong. 1st Sess., reprinted in [1953] U.S. Code Cong. & Admin. News p. 2409. Under the provisions of Public Law 83-280 it appears therefore that the State of Oklahoma could have unilaterally assumed jurisdiction over any "Indian country" within its borders at any time between 1953 and 1968 had the Oklahoma Constitution been amended as required. After the enactment of Title IV in 1968 Oklahoma had to amend its constitution and the affected tribes had to consent to the State's assumption of jurisdiction over them before the State could acquire jurisdiction over "Indian country." *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Kennerly v. District Court*, 400 U.S. 423, 91 S. Ct. 480, 27 L.Ed.2d 507 (1971). However, the State of Oklahoma apparently has never acted pursuant to Public Law 83-280 or Title IV and assumed

jurisdiction over the "Indian Country" within its borders. *See Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 550 F.2d 442 (CA 1977) at note 3.

Oklahoma has not been granted, nor did it choose to assume civil jurisdiction over Indian Country either under the Act of August 15, 1953, or under Title IV of the Indian Civil Rights Act of 1968. Oklahoma has neither amended its constitution nor secured the consent of the Indians affected.[14] In the absence of compliance with 25 U.S.C. §1322(a), (P.L. 83-280, as amended), Oklahoma cannot exercise civil jurisdiction over Indians in the Indian Country.

The outgrowth of this summary review, is that clearly the *per se* rule of *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987) and *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985) prohibiting State taxation of Indians in Indian Country, remains applicable to Indian tribes in Oklahoma in general, and the Sac and Fox Nation in particular. The corollary to this rule is that the failure of the Oklahoma Tax Commission to plead and prove specific unambiguous congressional authority both to levy, and collect, the particular taxes at issue is fatal to

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[14] In *Ahboah v. Housing Authority of the Kiowa Tribe of Indians*, 660 P.2d 625 (Okla. 1983), the Oklahoma Supreme Court stated: "The Kiowa Tribe has not assented to the assumption of jurisdiction by the State of Oklahoma. Therefore Oklahoma to assume jurisdiction under Public Law 280 must have done so under the original 280 Act before the amendment by the Civil Rights Act of 1968." The Court went on to determine that the State of Oklahoma had not acquired jurisdiction pursuant to the original Public Law 280.

its cause. Simply stated, state authority to tax an Indian tribe or individual Indians within the Indian Country are completely preempted by federal law in the absence of Congressional action to the contrary.

B. THE SAC AND FOX TREATIES PRECLUDE STATE TAXATION WITHIN THE NATION'S INDIAN COUNTRY.

Articles 7, 9, 13, and 14 of the Sac and Fox Treaty At Fort Harmar, 7 Stat. 28 (1789), and its legislative history, C.A. App. Exh. 5, and the Treaty of August 19, 1825, 7 Stat. 272, effectively grant the Sac and Fox Nation exclusive jurisdiction over all persons who "settle upon their lands" thus leaving no room for state taxation of the income or property of persons within the jurisdictional Indian Country of the Nation. Article 7 of the Fort Harmar treaty states in pertinent part:

> Trade shall be opened with the said nations and they do hereby respectively engage to afford protection to the persons and property of such as may be duly licensed to reside among them for the purposes of trade, and to their agents, factors, and servants . . .

and at Article 9:

> If any person or persons, citizens or subjects of the United States, or any other person, not being an Indian, shall presume to settle upon the lands confirmed to the said nations, he and they shall be out of the protection of the United States; and the said nations may punish him, or them, in such manner as they see fit.

Other provisions of this treaty provided for extradition of Indians committing crimes outside the Indian Country and punishment of non-Indians committing crimes against Indians outside the Indian Country, Art. 5; mutual return of stolen horses, Art. 6; and mutual assistance in time of war, Art. 8.

The importance of these provisions is that they cut from the whole cloth the legal and political relationship between the Sac and Fox Nation and the United States, the basic terms of which have not been repealed or modified to date by the policy making branch of the Government. While the area of land occupied by the Sac and Fox Nation has been changed by a series of land transactions contained in their treaties, the terms under which that occupancy has been maintained have not changed – in direct contrast to the Cherokee involved in *Worcester v. Georgia*, 6 Pet. 515 (1832), for instance, whose similar treaty was abrogated after the Civil War.

In *Worcester*, supra, the Marshall Court determined that these types of treaty provisions left no room for State action, even with respect to non-Indians, within the Tribe's territory. The Treaty was entered into as one of the first acts of the new federal government under the Constitution in response to a diplomatic communication from the Tribes Northwest of the Ohio River and others dated December 13, 1786, requesting a meeting to resolve differences and disputes between the Tribes and the fledgling United States. C.A. App. Exh. 5, pp. 8-9. On July 20, 1787, Secretary of War Knox reported to Congress as follows:

> The design [of the communication] if so comprehensive and perplexing to the United States, as reasonably to excite a well grounded suspicion,

that it has been dictated by the subtle policy of the British chief, in Canada, for purposes that are yet to be developed. But, however this conjecture may be founded, or whatever may be the influence, or motives which effected the confederation, your Secretary apprehends, that it now has assumed a form, and power, which renders a war, or a treaty inevitable. A slight consideration of the subject will enable the mind to form a satisfactory result of the measure which ought to be pursued.

Independent of the general but strong principles of humanity which ever forbid a war for an object which may be obtained by peaceable and honorable means; it is to be apprehended that the finances of the United States are such at present as to render them utterly unable to maintain an Indian war with any dignity or prospect of success. . . .

> The invitation to the treaty is so artfully drawn that unless it be attended to by the United States, and a war should ensue, it will operate as a manifesto, by which it will appear that we preferred War to Peace. The appeal being made, the United States may have the verdict of mankind against them; for men are ever ready to espouse the cause of those who appear to be oppressed provided their interference may cost them nothing; but the consequence may fix a stain on the national reputation of America.

JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, Vol. XXXII 1789, pp. 388-389, C.A. App. Exh. 36.

Apparently, the Congress agreed with Secretary Knox, for the Treaty ensued pursuant to instructions to Arthur St. Clair, Governor of the Territory Northwest of the river Ohio

from Charles Thomson, Secretary of the Congress which specifically authorized the stipulation of Article 9 that "any white person going over the said boundary" may be "treated in such manner as the Indians shall think proper." C.A. App. Exh. 5, p. 9. The Sac and Fox Treaties, then, are even more explicit than the treaty at issue in *McClanahan*, supra. It is apparent that the Sac and Fox exerted such jurisdiction over non-Indians through the allotment period, C.A. App. Exhs. 34 (tax on licensed traders) and 35 pp. 11, 13, and this claim has been preserved throughout the history of the Sac and Fox – United States relationship to the present day. *See*, generally, C.A. App. Exh. 6. Therefore, it is clear that the attempts of the Oklahoma Tax Commission to levy and collect taxes within the Indian Country of the Sac and Fox Nation infringe on their treaty rights of self-government, are pre-empted by federal treaty and law, and cannot stand.

C. STATE TAXATION WITHIN THE SAC AND FOX INDIAN COUNTRY INFRINGES UPON THEIR RIGHT TO SELF-GOVERNMENT.

Respondent's primary position is that the Oklahoma Tax Commission, if it wishes to extend its laws into the Indian Country, should simply be required to comply with the Congressionally mandated procedure for the acquisition of such jurisdiction through P.L. 83-280, as amended, by seeking express legislative authority for its actions from its own State legislature insofar as non-tribal members are concerned, and be required to seek specific unambiguous legislation from Congress authorizing the application of its laws within the Indian Country insofar as Sac and Fox tribal members are concerned. In the alternative, Oklahoma cannot tax here absent a governing

Act of Congress because such taxes would infringe on tribal self-government. *Williams v. Lee*, 358 U.S. 217 (1959).[15]

Only Congress may regulate commerce with the Indian Tribes. U.S. Constitution, Art. I, Sec. 8, Cl. 3. To allow the State to unilaterally regulate commerce between Indians and members of the same or other Tribes, or non-Indians,[16] through taxation, licensing, or other means in the absence of Congressional consent is to read this Clause out of the Constitution, Federalist Papers No. 3, p.

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[15] Like the extinguishment of reservations, there is no doubt that Congress knows precisely how to grant States criminal and civil jurisdiction over the Indian Country and tribal members within that State's borders when it chooses to do so. 25 U.S.C. §232 (New York – Criminal Matters); 25 U.S.C. §233 (New York – Civil Matters); 18 U.S.C. §3243 (Kansas – Criminal Matters); 25 U.S.C. §1708 (Rhode Island – Civil and Criminal); 25 U.S.C. §1725 (Maine – Civil and Criminal); 25 U.S.C. §§1746, 1747 (Florida/Miccosukee Tribe – Civil and Criminal); 25 U.S.C. §1755 (Connecticut – Civil and Criminal); 25 U.S.C. §1771e (Massachusetts – Civil and Criminal).

[16] The Sac and Fox Nation understands that its cross-petition for a Writ of Certiorari was denied by this Court. However, given the statement in Rule 14.1(a) that "The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein" the Nation is unsure as to whether it will be allowed to argue for reversal of the Tenth Circuit's ruling adverse to it as to members of other Tribes and non-Indians. The Nation will do so if given the opportunity as it does not wish to unintentionally concede this issue. However, the treaty provisions are the same whether one considers tribal members, other Indians (See, the references to the recent Congressional reversal of the recent Court ruling drawing distinctions between Indian set out in the Cross-Petition of the Nation in No. 92-499) and non-Indians.

43-44; No. 42, pp. 268-269 (C. Rossiter, Ed. 1961) (NAL Penguin, Inc., Pub.). Contrary to the Oklahoma Tax Commission's position, the rules for state taxation in the Indian Country are exactly the opposite of the normal taxation rules. As the Court stated in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985):

> The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we stated earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation; second, statutes are to be construed liberally in favor of the Indian, with ambiguous provisions interpreted to their benefit.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court recognized that the federal law imposed a *per se* rule prohibiting state taxation of Indian Tribes absent the express consent of Congress. The cases prohibiting state taxation of Indians within Indian Country in the absence of unmistakable authorization from Congress are legion. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Moe v. Confederated Salis and Kootenai Tribes*, 425 U.S. 463 (1976); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980);

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

The Tenth Circuit ruled in this case "that direct state taxation of tribal property or the income of a tribal member earned solely on a reservation is *presumed* to be preempted, *absent express congressional authorization.*" (Emphasis added.) OTC Pet. Cert. at App. A-3. This is consistent with this Court's ruling in *McClanahan*, supra at 170-171:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by an act of Congress.

The income at issue in this case is earned within Indian Country working for the tribal government, where both the federal and tribal government's interest in establishing strong tribal governments is at its zenith and are *per se* preempted as an infringement or tribal self-government.

Petitioner, Oklahoma Tax Commission relies on *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). This case is inapplicable for several reasons. First, *Oklahoma Tax Commission v. United States* did not involve what was then perceived as an autonomous tribal government with a taxation system in place working toward less dependence upon outside sources and actively governing its territory. This case does. The *Oklahoma Tax Commission*

case dealt with the Five Civilized Tribes whose taxing powers and other significant powers of self-government had at that time been diminished by Act of Congress.[17] It has never been held that any governmental powers of the Sac and Fox Nation were abolished. In fact the Petitioner admits that the Sac and Fox may tax. Further, that case dealt, not with whether a State could extend its laws into the Indian Country *sans* Congressional consent, but with whether particular property made unrestricted and taxable by Act of Congress was to be considered as nontaxable after Congress simply reimposed restrictions against alienation *while providing for continued taxation of the property.* In the case at Bar, Congress has never authorized State taxation within the Sac and Fox Indian Country.

The Petitioner also argues that its tax should be allowed because it provides services to members off the Reservation. However, states may not tax personal property of tribal members located upon reservations even if the state had the duty and responsibility of providing criminal and civil jurisdiction for the reservation, *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), which, in this case, it does not. It is difficult, to say the least, to be satisfied with the argument that a State which chooses *not* to follow the Congressionally mandated process for

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[17] As noted in *Board of County Comm'rs. of Creek Co. v. Seber*, 318 U.S. 705 (1943), Congress had authorized the Five Civilized Tribes to resume their former powers. The Muscogee (Creek) Nation has done so. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir., 1988).

obtaining civil jurisdiction within its borders may somehow claim even more authority over the persons and property within that Indian Country than a State which has followed the Congressional rules. Yet this is precisely the Oklahoma Tax Commission's argument.

The Petitioner continues to ignore the fact that the Sac and Fox Nation provides governmental services to its members and other residents of its jurisdiction while the State does not. Without any support in the record, it makes the unabashed claim that "Oklahoma has assumed the burdens of jurisdiction over the Indians in this state" Pet. Brf. On Merits at 13. If this is so, the State Courts and Federal Courts sitting in Oklahoma are certainly unaware of the situation. C.A. App. Exhs. 18, 27, 28, 29, 30, 31, 32, *United States v. Littlechief,* No. 76-207-D (W.D. Okla., Nov. 7, 1977) followed and reprinted in *State v. Littlechief,* 573 P.2d 263 (Okla. Crim. 1978) (murder case); *C.M.G. v. State,* 594 P.2d 798 (Okla. Crim. 1979) cert. den. 444 U.S. 992 (1979) (murder case); *Cheyenne-Arapaho Tribes v. Oklahoma,* 618 F.2d 665 (10th Cir. 1980) (hunting and fishing); *Ross v. Neff,* 905 F.2d 1349, 1352 (10th Cir. 1990), (county sheriff without authority to arrest Indian within Indian Country); *Housing Authority of the Seminole Nation v. Harjo,* 790 P.2d 1098 (Okla. 1990) (eviction); *Ahboah v. Housing Authority of the Kiowa Tribe,* 660 P.2d 625 (Okla. 1983).

Employment within Indian Country directly involves the Tribe through its inherent regulatory power over the work place, its form of government, and the federal policy of encouraging economic development within Indian Country. *See e.g.,* Indian Self-Determination Act, 25 U.S.C. §450a *et seq.* and Indian Finance Act, 25 U.S.C. §1451 *et seq.* In fact, the Sac and Fox Nation is one of the few

Tribes selected to participate in the Tribal Self-Governance Demonstration Project authorized by Congress, 25 U.S.C. §450f, Note, Section 209 of Pub.L. 100-472, as amended by Pub.L. 102-184, §§2 to 6, Dec. 4, 1991, 105 Stat. 1278. Members and non-members enjoy the protection of the laws, courts, police, and other Tribal services while within the Sac and Fox jurisdiction. C.A. App. Exhs. 3, 4, 44, 45, 46, 47, 48. There is nothing in the record which suggests that the State of Oklahoma offers governmental services for those individuals, members or not, within the Sac and Fox jurisdiction.

The federal government maintains Indian schools attended by Tribal members and other Indians, as well as programs that significantly compensate the states for educating Indian children residing on Indian lands for the very reason that the state cannot tax within Indian Country. *See,* 20 U.S.C. §238, Impact Aid and, 25 U.S.C. §§452-457, Johnson O'Malley programs. The State of Oklahoma has no legal duty to provide services to the Sac and Fox Nation's jurisdiction.

The Tax Commission appears to believe the transactions being taxed occur off Reservation. However, it should be very clear that the transactions attempting to be taxed by the State arise on Tribal lands. When a person is employed, and work is done within Sac and Fox lands, or cars are garaged within the Nation's jurisdiction and those actions are taxed by the State, then Tribal self-government is infringed by the State. The State taxes concerning both income and the motor vehicle personal property tax are not solely directed at building roads or schools. The taxes involved herein are used by Oklahoma for various governmental functions.

The key factor involves interference with tribal self-government. The Commission incorrectly states the lesson of *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 100 S.Ct. 2069 (1980). *Colville* is not based on geography. *Colville* says that tribal sovereignty does not allow marketing tax exemptions by importing goods into Indian Country and reselling them for immediate export to outside the Indian Country. It further states that motor vehicles are not taxable by the state even though they are driven on state roads because it is the value of the vehicle which is being taxed.

The cars of people living within the Sac and Fox jurisdiction are not principally garaged there to avoid state taxes. People are not working for the Sac and Fox Nation to avoid state taxes. It could, in fact, be that such employees would make better salaries working for the State of Oklahoma. The member and non-member in the case at bar work and earn income in Indian Country at jobs which would not exist but for the daily involvement and participation of the Nation, and the reservation economy.

Going off reservation after work does not mean that the value of their labor was generated off reservation. If income which is earned from activity carried out in the Indian Country is taxable, the effects on a tribe's ability to self-govern would be disastrous. Likewise, the inability to freely tax personal property owned by members and non-members living on the reservation would have detrimental effects upon tribal governments. Tribal governments would not have a sufficient tax base to be able

to effectively serve people living within their jurisdictions, and would be doomed to depend upon federal authorities to provide services to members.

The power of taxation is used for many other purposes than simply raising revenue. It is also used to encourage or discourage certain conduct, or to regulate certain conduct. Ultimately allowing unilateral assumption of the authority to tax and regulate activity, conduct, and property in the Indian Country means that the Nation's federally protected right to self-government is defeasible by the State, or can only be exercised at the sufferance of the State. Such a result is clearly contrary to both the letter of the Constitution, treaties, and statutes, and the current policies of Congress. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Iowa Mutual Ins. Co. v. LaPlante*, 107 S.Ct. 971 (1987); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852 (1985).

CONCLUSION

For the foregoing reasons, the Court should rule that persons working and owning vehicles garaged within the Sac and Fox Indian Country, including its 1867 Reservation, are not liable for the State taxes at issue herein. All of which is

Respectfully submitted,

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